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Supreme Court, U.S.
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No. 265

In the Supreme Court of the United States

October Term, 1959.

SEISMOGRAPH SERVICE CORPORATION, *Appellant*,

vs.

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of Mississippi.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS.

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I the Supreme Court of the United States.

October Term, 1969.

No. 285

SEISMOGRAPH SERVICE CORPORATION,
Appellant,
vs.
NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS.

The appellant, Seismograph Service Corporation, has appealed from a decision of the Supreme Court of the State of Mississippi denying it a refund of state gross receipts taxes on the conclusion that the same did not violate the Commerce Clause or the Fourteenth Amendment to the federal Constitution as alleged. Appellant's Jurisdictional Statement represents that the Supreme Court of the United States has jurisdiction of such an appeal under Title 28, USC, Section 1257(2), on the grounds that the decision of the highest court of the State of Mississippi upheld a statute the validity of which was drawn in question as being repugnant to the federal Constitution.

The appellee, Noel Monaghan, Chairman, State Tax Commission, has now filed its Motion to Dismiss contending that this cause does not present a substantial federal question and that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument. This brief statement is respectfully submitted to point out to the Court the absence of any showing by appellee in support of its Motion to Dismiss of the grounds on which such dismissal may be sustained.

The arguments presented by appellee in support of its Motion to Dismiss are not directed to the matter of how substantial are the questions which have been raised on this appeal. Instead, the appellee argues a proposition of law which was never an issue below and is not an issue here. Appellant has never denied that "a state has the right to tax local activity carried on within its borders." (Motion to Dismiss, page 4) Appellant has simply contended *ab initio* that its operations for each client were integral and unitary activities in interstate commerce for which it charged and received one unallocable fee, all of which was unconstitutionally subjected to the Mississippi tax without apportionment.

It is apparent that the contentions made by appellees in support of its proposition of law are contentions as to the very facts which this Court has jurisdiction to examine and review in considering "the real nature of the tax and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U. S. 363, 367, 50 S. Ct. 121, 123, 74 L. ed. 478. See also *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108. Obviously, if the evidence shows that "appellant's

operations are purely local" there would be no interstate commerce involved and no valid objection to the tax on the constitutional grounds. But the appellee does not contend, and the Supreme Court of Mississippi did not conclude, that appellant's operations are purely local. Both recognized that appellant's operations consisted of the gathering of information in Mississippi and the interpretation, mapping and reporting thereof in Oklahoma. The Supreme Court of Mississippi said, (Jurisdictional Statement, page 26):

> "In fact, the work done in this State was essential to the interpretative work done in the appellee's home office in Tulsa, Oklahoma" * * *."

The appellee, at page 7, Motion to Dismiss said:

> "True enough only one fee was charged but that fee was based entirely upon appellant's local operations and *not for the whole service or completed job.*" (Emphasis added)

Thus the point argued by appellee is not that appellant's operations are purely local but that the charges which appellant made for its services were based upon its operations in Mississippi. It is respectfully submitted that this is a question of fact as to which the great weight of uncontroverted evidence in the record is contrary to the contentions of appellee in this argument.

The question of whether appellant's operations are local or interstate activities or whether appellant's charges were for local or interstate services are questions directly pertaining to the merits of this case and are properly to be determined by this Court with briefs on the merits and oral argument.

With respect to the further propositions urged in support of appellee's Motion to Dismiss, there is no issue requiring further argument in opposition. Appellant recognizes that "neither the execution nor payment of contract in another state constitutes interstate commerce" (Motion to Dismiss, page 7) if such be the only interstate features involved in an otherwise local activity. But the point which is urged under that proposition fails to give recognition to all of the other integral interstate activities shown by the evidence to be involved in the performance of appellant's services (see Jurisdictional Statement, pages 5-7). The argument as to whether the interstate activities involved in a course of business are such as to constitute that business one in interstate commerce is again one which goes to the merits of this appeal and which requires an examination of the evidence to define the nature of such activities and a judicial determination as to whether they constitute interstate commerce in accordance with this Court's pronouncements on the subject.

Similarly, the argument appearing at page 8 of the Motion to Dismiss under the proposition that "The Burden of Proof Is on Appellant" to prove unfair apportionment begs the question on appeal for if the tax burdens interstate commerce it is unconstitutional and no further proof is necessary. In any view it would seem rather obvious that a state tax which falls upon 100% of the gross receipts from interstate commerce "fails to achieve a fair apportionment."

In summary, it is respectfully submitted that the argument of appellee consists entirely of its contentions on

the points at issue in this appeal and has no bearing on the grounds upon which the Motion to Dismiss has been brought other than to say, in effect, that assuming such contentions are correct there are no grounds for appeal. In order to determine the correctness of such contentions, however, it is necessary that the Supreme Court of the United States determine the appeal on its merits resolving the ultimate questions of fact and the proper application of law.

Conclusion.

Appellant respectfully submits that the grounds upon which appellee moves to dismiss this appeal are wholly unsupported by the arguments which accompany its motion. Such arguments provide no showing that this cause does not present a substantial federal question or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The Motion to Dismiss should be denied.

Respectfully submitted,

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